Supreme Court, U.S.
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89-1635

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

NORTHWEST ADVANCEMENT, INC.,
JEFF HENKE, JOE GEER, and TIM COX,

Petitioners,

v.

OREGON Bureau of Labor,
OREGON WAGE AND HOUR COMMISSION, and
MARY WENDY ROBERTS, Commissioner
of the Oregon Bureau of Labor,

Respondents.

ON WRIT OF CERTIORARI
IN THE COURT OF APPEALS
OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Rules of the Wage and Hour Commission Impermissibly Restrict Petitioners' Right of Free Commercial Speech?

Does a state administrative rule which completely prohibits minors under the age of 16 years from canvassing, peddling or soliciting door-to-door, including solicitation of subscriptions for magazines and canvassing for political and charitable organizations violate the minors' and/or their employer's right of free speech under the First Amendment of the United States Constitution, since the rule is not narrowly tailored to serve the alleged government interest in protecting minors?

2. Do the Rules of the Wage and Hour Commission Violate the Equal Protection Guarantees of the Fourteenth Amendment?

Does an administrative rule which prohibits employment of minors under 16 years of age as door-to-door salesmen, canvassers, or peddlers (and restricts such employment for minors ages 16 and 17), including solicitation of subscriptions for magazines and canvassing for political and religious organizations, violate the Fourteenth Amendment guarantee of equal protection of the laws, when the same rule completely exempts those minors who solicit subscriptions for the local newspapers, and their employers, the newspapers, which is the state's largest employer of minors.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the court below.

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DECISIONS BELOW

The decisions of the courts below for which review is sought, beginning with the most recent decision of the Oregon Supreme Court, are as follows:

1. Oregon Supreme Court Decision denying review: Northwest Advancement, Inc., et al. v. Wage and Hour Commission et al., 308 Or. 315, _____ P.2d _____ (1989), App-56.

2. Oregon Court of Appeals Opinion: Northwest Advancement, Inc., et al. v. Wage and Hour Commission et al., 96 Or. App. 146, 772 P.2d 934 (1989), App-21.

3. In Re: Northwest Advancement, et al., Wage and Hour Commission No. 01/86, App-1.

4. In Re: Northwest Advancement et al.,Bureau of Labor Nos. CL01/86 and 02/86, App-9.

THIS COURT'S JURISDICTION

The decision in the court of appeals of the State of Oregon was made and entered on April 12, 1989. The Supreme Court of the State of Oregon, the highest court of the State of Oregon, thereafter denied Petitioner's Petition for Review on August 29, 1989, App-56. The Oregon Supreme Court denied a Petition for Reconsideration on November 16, 1989, App-57.

On February 28, 1990, this Court granted an extension of time within which to petition for certiorari up to and including April 15, 1990 (a Sunday), App-58.

Therefore, this Court has jurisdiction to review the decision in question by writ of certiorari under 28 U.S.C. § 1257(a), and is timely under 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

Question No. 1: (Do the Rules of the Wage and Hour Commission Impermissibly Restrict Petitioners' Right of Free Commercial Speech):

Amendment I of the Constitution of the United States of America provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The rule of the Wage and Hour Commission of the State of Oregon, as amended by BL 1-1985, provides:

OAR 839-21-097(2)

> No person under 16 years of age:
>
> * * * * *
>
> (c) May be employed to act as a canvasser, peddler, or "outside salesman" as defined in

ORS 653.010(8), from house to house.

OAR 839-21-265 provides:

> (1) No person from 16 to 18 years of age may be employed to act as a canvasser, a peddler, or an "outside salesman" as defined in ORS 653.010(8), from house to house, unless the employer obtains and maintains a validated registration certificate issued by the Bureau of Labor and Industries.

* * * * *

[The rule then sets forth numerous requirements, including the following]:

> (11) In addition to all other rules of the commission, employers employing persons from the age of 16 to the age of 18 to act as a canvasser, peddler or "outside salesman" as defined in ORS 653.010 (8), from house to house shall provide each person, before the person begins work, with an identification card. The identification card shall be on a form prescribed by the Executive Secretary. The identification card shall include:
>
> (a) A picture of the employee;

(b) The name of the employee;

(c) The name and local address of the employer;

(d) A statement to the effect that the employee is authorized to represent the employer as a canvasser, peddler or "outside salesman";

(e) A statement to the effect that the employer is registered with the Bureau of the Labor and Industries, 1400 S.W. 5th Avenue, Portland, Oregon 97201 (229-5750);

(f) A statement that the card is not valid for any other employer; and

(g) Other information as the Executive Secretary may require to carry out the purpose of this subsection.

Question No. 2: (Do the Rules of the Wage and Hour Commission Violate the Equal Protection Guarantees of the Fourteenth Amendment?):

Amendment XIV, Section 1 of the Constitution of the United States of America provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws.

Former OAR 839-21-107, current OAR 839-21-500, exempts newspaper carriers and newspaper vendors from the regulations of the Wage and Hour Commission set forth above. OAR 839-21-107 provide:

> Minors employed at domestic work and chores in or about private residences and newspaper vendors are not subject to this order.[1]

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[1] Newspaper vendors include those who solicit subscriptions door-to-door (Rec: 797, 877, 2005, 2018).

STATEMENT OF THE CASE

1. Facts

This case involves a challenge to a rule adopted by the Oregon Wage and Hour Commission (hereinafter the "Commission") in January 1985, effective March, 1985. The rule, BL 1-1985, was codified primarily as OAR 839-21-097 and OAR 839-21-265. This rule absolutely prohibited minors under 16 years of age from engaging in a common calling, namely door-to-door canvassing, peddling, and outside sales of magazine subscriptions, books, and other household products, and for political, religious and charitable organizations and restricted such work for minors 16 and 17 years of age. At the same time, the Commission exempted from these same prohibitions minors similarly situated, namely those who are employed by newspapers to solicit subscriptions. The rule, after adoption by the Commission,

was enforced by the Oregon Bureau of Labor.

Petitioners challenged the rule after its adoption by filing a complaint in the Marion County Circuit Court (in Salem, Oregon), seeking, inter alia, to have the rule declared invalid as unconstitutional. The state responded by filing a suit seeking a mandatory injunction against Petitioners in Multnomah County Circuit Court (in Portland) to enforce the regulation.[2] At the same time, the Oregon Wage and Hour Commission commenced administrative proceedings to revoke Petitioners' right to employ minors, and the Oregon Bureau of Labor commenced administrative proceedings to impose civil

[2]These proceedings are Marion County Circuit Court Case No. 85-1052 and Multnomah County Circuit Court Case No. 8601-00401, consolidated on appeal as Court of Appeals Nos. 41042 and 41109. A petition for certiorari has been filed as Sup. Ct. Case No. 89-1495.

penalties.[3] The within petition seeks certiorari from the decisions of the Oregon Court of Appeals on the consolidated appeals from the decisions of the administrative agencies, the Oregon Wage and Hour Commission and the Oregon Bureau of Labor. A separate petition has been filed from the decision of the Oregon Court of Appeals in the circuit court proceedings as United States Supreme Court Case No. 89-1495.

The rules in this case were promulgated by the Wage and Hour Commission pursuant to ORS 653.305. That statute directs the commission to investigate and establish suitable hours and conditions of employment for minors:

> "The Commission may inquire into wages or hours or conditions of labor of minors employed

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[3] These proceedings are Commission Case No. 01-86, and Bureau Case Nos. CL-01/86 and CL-02/86, and were consolidated on appeal as Court of Appeals No. 42520 and 42899.

> in any occupation in this state and determine suitable hours and conditions of labor for such minors". ORS 653.305

The Commission held a fact-finding hearing as required by law on October 18, 1984 prior to promulgating its rules governing door-to-door solicitation by minors. The Commission had invited three witnesses for the purpose of adducing evidence to determine if there was any need to enact special rules for minors selling door-to-door. Only two of the three witnesses actually showed up and testified. A representative of the Better Business Bureau of Portland testified that his organization had received complaints in other states about for-profit businesses selling candy, cookies, and candles to the public by masquerading as charitable, nonprofit organizations (Rec:

2080-81, 2083).[4] Thus, what he offered was hearsay about activity in other states. When asked to describe how widespread the "problem" was, he stated that he did not have any actual knowledge of the situation and could not present any evidence on the situation in Oregon (Rec: 2093-94).

A representative of the Multnomah County District Attorney's Office also testified at the hearing. However, when he arrived, he admitted he did not know why he had been asked to appear. He had no knowledge of any problems regarding door-to-door solicitation (Rec: 2098-2100).

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[4] The transcript of the Multnomah and Marion County proceedings was offered and reviewed in evidence as part of the administrative record. (Rec: 934-2241) All Exhibits in the Circuit Court proceeding are part of the administrative record. Therefore, for ease of reference, all citations in both petitions to the circuit court transcripts, shall be to the Administrative Record as "Rec". "TR" shall refer to the transcript of the administrative hearing.

The record also reveals that a representative of the Portland Police Department was invited to attend and present testimony concerning "problems" with door-to-door solicitation. However, this representative, a Mr. Bob Bratton, failed to appear at the hearing (Rec: 2097, 2100).

In upholding the rule, the Oregon Court of Appeals held that the rule was "based upon the determination that that particular activity by minors is sufficiently dangerous." 96 Or App at 143, App.48.[5] This conclusion was based upon their erroneous belief that:

> the Bureau (of Labor and Industries) conducted a public hearing at which

[5] The Oregon Court of Appeals decision on the appeal from these administrative decisions, 96 Or. App. 146, App-21, relies on the analysis of its opinion on the appeal from the circuit court cases, 96 Or. App. 133, App-25. Thus, citations to the Opinion of the Court of Appeals are to the latter Opinion, which is incorporated by reference in the Opinion in the appeal from the Administrative cases.

> representatives of the Better Business Bureau, the Multnomah County District Attorney's Office, and the Hillsboro (sic) Police Department discussed their experiences with minors selling door-to-door. 96 Or App 143 (emphasis supplied), App. 49.

The administrative law judge overruled petitioners objections to the rule, but based on "advise" of counsel for the agencies, the attorney general's office, and the rulings of the circuit courts (Opinion App-4, 16). She made no independent determination. However, neither circuit court found, as did the court of appeals, that the Bureau had adduced evidence in support of the rule. The Oregon Court of Appeals was simply incorrect when it stated that the witnesses testified about personal experiences with door-to-door sales by minors; there was no such testimony. The public hearing was indeed the sole basis for the rule, but no evidence of specific

incidents was ever adduced (TR: 429, 447; Rec: 2018-2020, 2022, 2040-2041).

The Commission, at the same time, had also asked the Bureau to investigate newspaper practices to determine if an exemption from the rules of the Bureau was warranted for newspapers, and the minors who worked for newspapers as newspaper carriers and subscription solicitors.[6] But, the Bureau failed to perform any investigation. Furthermore, although the Bureau had received complaints about newspapers' employment of minors, it refused to record or investigate such complaints because it considered newspapers exempt from regulation (Rec: Ex. R-24, Rec: 797, 884-885, 1264-1265, 1279-1281, 1290).

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[6] Newspaper vending is exempt. See, former OAR 839-21-107, current OAR 839-21-500. The Bureau considers solicitation of subscriptions to be included within the definition of newspaper vending (Rec: 797, 877, 2005, 2018).

No evidence was ever offered to justify the exemption of minors from not only the rule adopted in 1985 by the Commission prohibiting door-to-door sales, but also from all other child labor laws of the state (Rec: 1196-1197, 1993-1994, 2016-2020, 2031-2032, 2017-2020, 2115-2126). In fact, neither the Bureau nor the Commission has ever investigated the newspapers' employment of minors as carriers and subscription solicitors (Rec: 1281, 2032, 2118-2119, 2121-2122; Ex. 138 to Appeal Nos. 41082 and 41109). The Bureau justified the exemption for an entire industry (newspapers) because "historically minors have always delivered newspapers" (Rec: 797, 884-885, 1281, 2017-2018, 2032, 2115-2125, Ex. 138 in Appeals Nos. 41042 and 41109). But, even assuming that justification is sufficient for newspaper carriers, it does not justify an exemption for minors soliciting newspaper subscriptions.

The Bureau's real intent when it in adopted BL-1-1985 was not to protect minors from overreaching employers, but to protect the public from door-to-door sales. One of the main reasons the Commission adopted BL-1-1985 was to stop door-to-door solicitation of subscriptions for magazines (Rec:806) At the meeting wherein the Commission decided to consider the rule, the administrator stated:

> "Magazines, that's what really brought all these consumer people together, was the magazine sales, where people come to your door and try to sell you 15 subscriptions. There are minor involved in that....(Rec: 806).

The Bureau also wanted to stop minors from selling household products, like candy, door-to-door. When the mother of one minor who had worked for petitioners called the Bureau to ask why the Commission had adopted rules forbidding 14 and 15 year-old minors from selling door-to-door, a Bureau representative said: "Actually, that law was made to put the

'candyman' out of business" [Rec: 2054]. Even the Bureau admitted that at least portions of the rule, such as that portion requiring a minor to wear an identification card, were designed to protect the public (e.g., homeowners) from door-to-door sales, not the minors [Rec: 2029].

Petitioner Northwest Advancement, Inc. (hereinafter, "NWA") is a for-profit, Oregon corporation which sells household products wholesale. NWA does not sell its products directly. Rather, subdistributors or "crew drivers" purchase the products on consignment and resell them to salespeople who, in turn, sell them door-to-door to consumers. Many of the salespeople were minors.

Petitioner Jeff Henke is the president and sole shareholder of NWA. Petitioners Joe Geer and Tim Cox were two NWA crew drivers.

Minors who worked for NWA earned good money; they earned an average of $60-$70 per week, and some earned over $100, for 12 to 16 hours of work (TR:296-297; Rec:1769, 1826-1827). While this amount of income would not likely sustain an adult, it is substantial for a teenager. The hours of work (week-nights and weekends) are not attractive to adults, but are not objectionable to teenagers.

Prior to March 1, 1985, 14 to 17 year-old minors could sell NWA products door-to-door; but as a result of BL-1-1985 only 16 and 17 year-old minors could thereafter sell door-to-door in residential areas. Northwest Advancement products could still be sold by 14 and 15 year-old minors, but only in commercial areas, such as shopping malls which certainly posed greater risk to them minor than selling in a residential area (Ex.119; Rec: 1714, 1824, TR:309, 462). Thus, minors under 16 who wanted to sell door-to-door after March 1,

1985 could only do so for newspapers (because newspapers were exempt from regulation). Newspapers take full advantage of the supply of minors, including minors under 14. Newspapers employ minors as young as 8 to solicit subscriptions. The minors often work in crews of 20, and are supervised by other minors as young as 14 years of age, and work until 10:00 at night. Newspapers, unlike NWA, work their minor salespeople an average of 5 nights per week, and some Saturdays, for 25-30 hours per week, but the minors are lucky if they make $5-$10 per week (Rec:1857, 1952, 2046-2047, 2127-2136, 2146, 2156).

It is a fact that 16 and 17 year-old minors tend to be embarrassed about selling door-to-door, as the newspapers well know. Younger minors, particularly those from poor families who lack social skills to get jobs at better restaurants or department stores, are happy to sell

door-to-door. Selling door-to-door not only gives these minors a chance to earn money, but to learn social and sales skills to get more prestigious jobs later (TR:292, 309; Rec: 1767, 2195-2196).

Minors and parents, and a state counselor, testified in these proceedings that NWA had made a very positive and real difference in the lives of the minors who sold NWA products, including improving their self-confidence, self-image, social skills, and scholastic performance (TR: 289-292; Rec: 1389, 1406-1407, 1412-1413, 1841-1843, 1850, 1857, 1860-1861-1867, 1910, 1912, 1938).

2. Federal Questions Raised Below:

Petitioners raised the federal constitutional questions presented in this Petition for Certiorari at the commencement of the administrative proceedings and in the brief filed in the administrative proceedings. Petitioners

alleged the rule violated plaintiff's rights under the First Amendment and rights to equal protection under the Fourteenth Amendment. Petitioners' brief, pp. 67-78, Commission No. 01/86 and Bureau Nos. CL01-86 and CL02/86; Rec: 563-576; TR:22).

The administrative law judge rejected plaintiff's First Amendment and Fourteenth Amendment objections in reliance upon the "advise" of counsel for the state that the rule was constitutional. The attorney general so advised, acting in his capacity as both opposing counsel and as counsel to the agencies (Advise Letter dated April 18, 1986). She also relied on the rulings of the circuit court judges (Opinion, App-4, 16).

Petitioners raised the federal constitutional questions in the Oregon Court of Appeals in assignments in their brief at pp. 57-62. The court of appeals considered but rejected these

constitutional objections at 96 Or. App. 148 by reference to the Opinion in the appeal from the circuit court cases, 96 Or. App. at 141-144, App-39-51.

REASONS FOR GRANTING CERTIORARI:

I. Question 1: Do the Rules of the Wage and Hour Commission Impermissibly Restrict Petitioners' Right of Free Commercial Speech

Petitioners challenge the following state rules as impermissably restrictive of their right of free commercial speech.

OAR 839-21-097(2):[7]

No person under 16 year of age:

* * * * *

(c) May be employed to act as a canvasser, peddler, or "outside salesman" as defined in ORS 653.010(8), from house to house.

OAR 839-21-265:

[7] OAR 839-21-097(2) has now been recodified as OAR 839-21-097(1). BL 6-1988.

(1) No person from 16 to 18 years of age may be employed to act as a canvasser, a peddler, or an "outside salesman" as defined in ORS 653.010(8), from house to house, unless the employer obtains and maintains a validated registration certificate issued by the Bureau of Labor and Industries.

* * * * *

(11) ...employers employing persons from the age of 16 to the age of 18 to act as a canvasser, peddler or "outside salesman" ... from house to house shall provide each person, before the person begins work, with an identification card. The identification card shall be on a form prescribed by the Executive Secretary.

* * *

The challenged rules in this case implicate speech because they absolutely prohibit minors under the age of 16 from engaging in door-to-door solicitation, and restrict such solicitation by minors 16 to 18 years of age. The rules themselves state that they apply to a minor engaged as a "canvasser, peddler, or outside salesman" and are thus directed at the minor's speech. In this case, the rules include minors who sell books, magazine subscriptions, and household products

(Rec: 806). Indeed, they also include minors who are employed by political or charitable organizations to solicit political or charitable contributions (TR: 468-469).

Federal courts have held that the First Amendment protects door-to-door solicitation for political and charitable purposes. Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 632-633, 100 S.Ct. 826, 63 L Ed 2d 73, reh den 445 US 972, 100 S Ct 1668, 64 L Ed 2d 250 (1980). The Ninth Circuit has held that door-to-door, residential solicitation for the purpose of selling household consumable products (candy) involves communication and thus implicates constitutionally protected commercial speech. Project 80's, Inc. v. City of Pocatello, 857 F2d 592, amended on rehearing, 876 F2d 711, 714 (9th Cir, 1989).

The First Amendment protects commercial free speech from needless government regulation. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748, 759-60, 96 S Ct 1817, 48 L Ed 2d 346 (1976). Commercial speech is expression which proposes a commercial transaction. Virginia State Board, supra at 762. Residential solicitations by minors propose such transactions and involve commercial speech.

The First Amendment rights of minors includes freedom of speech. See, Erznoznik v. City of Jacksonville, 422 US 205, 212-213, 95 S Ct 2268, 45 L Ed 2d 125 (1975); Tinker v. Des Moines Independent Community School District, 393 US 503, 511, 89 S Ct 733, 21 L Ed 2d 731 (1969). In reviewing the challenged rules, the court of appeals noted that "nothing in the challenged regulations prevents adults from soliciting door-to-door at any time," 96 Or. App. at 141, App-42, thus implying

that minors do not enjoy the same constitutional protection as do adults. As stated, the guarantees of the Constitution extend to minors as well as to adults. This Court has held that:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood of Missouri v. Danforth, 428 US 52, 74, 96 S Ct 2831, 49 L Ed 2d 788 (1976) (emphasis supplied); see, also, Tinker v. Des Moines School District, supra, 511; In re Gault, 387 US 1, 87 S Ct 428, 18 L Ed 2d 527 (1967).

This court set forth a four-prong test to determine whether commercial speech has been unlawfully restrained by a government restriction in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 US 557, 100 S Ct 2343, 65 L Ed 2d 341 (1981). This four-prong test was restated in the plurality decision of

Metromedia, Inc. v. San Diego, 453 US 490, 101 S Ct 2882, 69 L Ed 2d 800 (1980):

> "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." 453 US at 507.

This court recently restated the test for determining whether commercial speech has been unduly restricted in Board of Trustees S.U.N.Y. v. Fox, 492 US ___, 109 S Ct ___, 106 L Ed 2d 388, 402-404 (1989) (involving campus regulations prohibiting students from operating "commercial enterprises" in dormitory rooms). Although the government need not employ the least restrictive means necessary to achieve its interests, any government restrictions on commercial speech must be "narrowly tailored" to serve a "significant" government interest. Board

of Trustees S.U.N.Y., supra 106 L Ed 2d at 402. The State bears the burden of justifying its restrictions under this test. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra; Board of Trustees S.U.N.Y. v. Fox, supra, 106 L Ed 2d at 404.

The Oregon Court of Appeals did not deny the rule affected speech. It could hardly contend otherwise because the rule impacts speech intended to solicit orders for magazines and books, as well as other products. The First Amendment protection cannot be denied because speech is sold rather than given away. City of Lakewood v. Plain Dealer Publishing Co., 486 US ___, 100 L.Ed2d 771, 108 S.Ct. 2138, 2143 (1988). Rather, the Oregon Court of Appeals cited Metromedia, Inc., supra, and held that the Metromedia test had been met. Specifically, the court of appeals found the fourth element had been met as follows:

> "[The challenged regulations] reach no further than necessary to accomplish the governmental interest, because they permit the employment of minors 16 years of age and older as door-to-door salespersons under certain circumstances, of minors 14 to 16 years of age as salespersons in other circumstances and of adults as salespersons in all circumstances." 96 Or App at 141, App-44.

However, the court of appeals' conclusion that the rule reaches no farther than necessary was not based on any analysis. The court of appeals did not actually consider whether the rule could be more narrowly drawn. The court of appeals held that the rules were designed to improve the working conditions of minors, and advanced that interest by prohibiting that employment. However, that conclusion was suspect because if the purported objective of the challenged rule was to protect minors selling door-to-door, then why did the Commission exempt newspapers from the same prohibition (even though the Commission had no basis for distinguishing

one kind of door-to-door sales from another, and admitted as much, Rec: 2063-2079). After all, how can the Commission distinguish between a minor soliciting a newspaper subscription at a residence from one soliciting a magazine subscription from the same residence? And, to require a minor 16 or 17 years of age to wear an identification card does not advance the purported interest in protecting minors at all (the Commission admitted the purpose of this rule was to protect the homeowner). Thus, even assuming arguendo the Commission intended to advance the government's interest in protecting minors in employment, they did not advance that interest because, inter alia, they did not address what is at least as great a risk posed to those minors who solicit newspaper subscriptions. Further, the rule also permits minors 14 and 15 to sell in commercial areas, such as shopping malls, which poses at least as great a

risk to their welfare, if not more, than door-to-door residential sales. Most important, however, the rule is much broader than necessary to serve the government's interest in protecting minors, and is not a reasonable fit.

The Commission could have adopted a reasonable rule. For example, the Wage and Hour Commission could have promulgated rules which limit the number of such minors who can work on a crew, require that a licensed adult accompany each crew and remain within one block of them as they go door-to-door, and establish reasonable restrictions on the hours they may work, such as 4:00 to 9:00 p.m. on weekdays, and require return transportation. But, to completely prohibit such employment is not even arguably to "narrowly-tailor" regulations.

Where a rule restricts speech, the administrative convenience of the rule is irrelevant if the rule is not also

narrowly tailored. White House Vigil v. Clark, 746 F2d 1518, 1531 (DC Cir, 1984).

To the extent that the challenged rule involves the regulation, rather than the prohibition, of the exercise of speech by minors 16 and 17 years of age, the court of appeals should have reviewed the rules to determine whether they imposed reasonable time, place, and manner restrictions in light of the legislative objectives. See City of Watseka v. Illinois Public Action Council 796 F2d 1547 (7th Cir 1986), aff'd w/o opinion, 479 US 1048, 107 S Ct 919, 93 L Ed 2d 972, reh den 107 S Ct 1389 (1987). The court of appeals did not even address this issue.

The City of Watseka case involved an ordinance which prohibited all door-to-door solicitation for any purpose whatsoever after business hours and prohibited all door-to-door solicitation on weekends and holidays. The purpose of

the ordinance was to prevent fraudulent sales activities and protect residents' right to privacy. The court of appeals for the Seventh Circuit concluded that the ordinance violated the First Amendment of the United States Constitution because the city failed to show, inter alia, that there was a significant relationship between the ordinance's time restrictions and the city's asserted interests, and that the city had employed the least restrictive means to protect those interests. City of Watseka, supra, 796 F2d at 1555-58. In Project 80's, Inc. v. City of Pocatello, 857 F2d 592 (9th Cir, 1988), amended on rehearing, 876 F2d 711 (9th Cir, 1989), the Ninth Circuit has now struck down two Green River ordinances in towns in Idaho under the First Amendment, stating that the existence of effective alternatives measures to serve the town's interests preclude the broad prohibition by such ordinances of the

commercial speech inherent in residential door-to-door solicitation. Here, as in Project 80's, Inc., supra, effective alternatives exist to the broad prohibitions and restrictions upon minors' commercial speech.

Under Board of Trustees S.U.N.Y., supra, 106 L Ed 2d at 404, the free speech guarantee of the First Amendment requires a more "reasonable fit" between the regulation and the state's objectives. In Board of Trustees, S.U.N.Y. v. Fox, supra, the State University of New York's campus regulations prohibited students from operating "commercial enterprises" in dormitory rooms. Students and company representatives arrested for, and prevented from, holding a "tupperware" party challenged the regulations. This Court remanded the matter for a full evidentiary hearing to determine if the regulations "substantially burdened more speech than necessary to further the

government's legitimate interests." Board of Trustees, S.U.N.Y., supra, 106 L. Ed.2d at 402, citing Ward v. Rock Against Racism, 491 U.S. ___, 109 S. Ct. ___, 105 L.Ed.2d 661 (1989). Flat prohibitions and unnecessary restrictions do not satisfy the requirements of Board of Trustees S.U.N.Y., supra, and are unjustified.

Former OAR 839-21-097(2)(c) [current OAR 839-21-097(1)(c)] purports to protect the welfare of 14 and 15 year-old minors by prohibiting them from employment in door-to-door residential sales. However, as stated above, there are narrower, more reasonable, means which would protect such minors without abridging their rights to commercial free speech. Establishing reasonable rules over door-to-door solicitation by minors, in conjunction with the power to penalize employers who violate the rules, would narrowly tailor the restrictions to a "reasonable fit" with the government's stated objectives,

as required by Board of Trustees S.U.N.Y., supra, 106 L Ed 2d at 404.

The rules at issue are also overbroad because they flatly prohibit minors under the age of 16 from engaging in commercial speech, by prohibiting them from being employed to canvas, peddle, or sell door-to-door. In Johnson v. City of Opelousas, 658 F2d 1065, 1074 (5th Cir, 1981), the fifth circuit held that a city curfew ordinance that prevented minors under 18 from being on the streets between 11:00 p.m. and 4:00 a.m. was unconstitutionally overbroad. The court held that the ordinance, to the extent that it implicitly prohibited minors from engaging in protected First Amendment activities, including legitimate employment, was overbroad and violated the First Amendment rights of minors. Johnson v. City of Opelousas, supra at 1072. The prohibitions against employing minors under 16 as door-to-door salespeople and

restricting 16 and 17 year-old minors are explicit. In addition, the prohibition includes employment of minors to solicit door-to-door for books, magazine subscriptions and for charitable or political organizations (Rec: 806; TR: 468-469). These rules would clearly be unconstitutional under the First Amendment if directed solely at religious, charitable, and/or political speech. Village of Schaumberg v. Citizens for a Better Environment, 444 US 620, 631 (1980). Indeed, because the rule applies to minors employed to canvass by political, religious and charitable organizations, it infringes on non-commercial free speech protected by the First Amendment, and, therefore, the rule should be analyzed under the non-commercial test of Schaumberg, supra. The Oregon Court of Appeals failed to consider either the impact of the rule on

political, charitable, and religious speech, or the rule's overbreadth.

This court should grant certiorari because the decision of the Oregon Court of Appeals, which the Oregon Supreme Court declined to review, is in conflict with the decision of this court and the decisions of the federal courts of appeals cited above on an important federal question.

II. Question 2: Do the Rules of the Wage and Hour Commission Violate the Equal Protection Guarantees of the Fourteenth Amendment

Petitioners further challenge the rule of the Wage and Hour Commission on the grounds that it violates petitioner's rights to equal protection under the Fourteenth Amendment of the United States Constitution. Wage and Hour Commission's rule OAR 839-21-500 exempts newspaper vendors and carriers from administrative

regulation. Former OAR 839-21-107[8] provided:

> "Minors employed at domestic work and chores in or about private residences and newspaper carriers and newspaper vendors are not subject to this order."

Here the classifications created by the rule, and the exemption therefrom, discriminate between minors who choose to solicit newspaper subscriptions door-to-door and those similarly-situated minors

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[8] Current OAR 839-21-500, effective April 12, 1988, exempts the employers of minors engaged in certain work, rather than the minors themselves. It provides:

> "The provisions of OAR 839-21-001 to 839-21-500 do not apply to employers employing minors in the following work or occupations:
>
> (1) Domestic work or chores in or about a private residence.
>
> (2) Newspaper carrier.
>
> (3) Newspaper vendor."

In the Court of Appeals' opinion, the court refers to the exemption as former OAR 839-21-107, but makes no mention of the current exemption, OAR 839-21-500. The exemption was not repealed but merely recodified, in April 1988.

who choose to solicit magazine subscriptions door-to-door, sell books or other household goods, or, for that matter, those who are employed to solicit for charitable and political organizations. Where, as here, a legislative classification discriminates with respect to the exercise of a fundamental right, the state must show the law is necessary to promote a compelling state interest. Sklar v. Byrne, 727 F2d 633, 636-637 (7th Cir, 1984); Eisenstadt v. Baird, 405 US 438, 447, n 7, 92 S Ct 1029, 31 L Ed 2d 349 (1972).

A right is fundamental where it is explicitly or implicitly guaranteed by the constitution. San Antonio Independent School District v. Rodriquez, 411 US 1, 33-34, 935 Ct 1278, 36 L Ed 2d 16 (1973). Free speech is clearly a fundamental right. Regan v. Taxation with Representation, 461 US 540, 547, 103 S Ct 1997, 76 L Ed 2d 129 (1983). ("Statutes

are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech").[9] These rights extend to minors. In re Gault, 387 US 1, 13, 87 S Ct 1428, 18 L Ed 2d 527 (1967).

A classification that paralyzes the exercise of a fundamental right must be narrowly drawn to promote only that interest or it violates equal protection. See, Carey v. Population Services International, 431 US 678 686, 97 S Ct 2010, 52 L Ed 2d 675 (1977); Shapiro v. Thompson, 394 US 618, 634, 89 S Ct 1322, 22 L Ed 2d 600 (1969). Here, former OAR 839-21-097(2), current OAR 839-21-097(1), and OAR 839-21-265 infringe on Northwest's and the crew drivers' fundamental rights of commercial free

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[9]In addition, this court has also held the right to work is protected. Truax v. Raich, 239 US 33, 41, 36 S Ct 7, 60 L Ed 131 1915).

speech by prohibiting employment in door-to-door sales.

The Court of Appeals refused to apply strict scrutiny to the challenged rule, stating "[b]ecause no fundamental interests are addressed by the challenged regulations, they need only have a rational basis to withstand Fourteenth Amendment scrutiny." 96 Or App at 144, App-51. In so holding, the Court of Appeals ignored the precedents set by this Court, cited above.

Since these rules involve a fundamental right, a compelling state interest must be served before classifying Northwest and minors employed by it differently from those similarly situated, namely newspapers and the minors employed by newspapers. Furthermore, even if some compelling state interest is served, the classification must be narrowly drawn to promote only that interest. See Carey v. Population Services International, supra

at 686. Equal protection guarantees apply to regulatory agencies as well as the legislature. Moose Lodge No. 107 v. Irvis, 407 US 163, 179, 92 S Ct 1965, 32 L Ed 2d 627 (1972).

Former OAR 839-21-107, current 839-21-500, grossly favors newspapers by exempting them from rules regulating child labor.[10] These rules classify differently two industries similarly situated. There is no difference between a magazine publisher who employs a minor to solicit a subscription and a newspaper publisher who employs a minor to solicit a subscription. The classification is not

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[10]The rule also favors generally employers of minors other than door-to-door sellers because the regulations are significantly more onerous in respect of door-to-door sales. For example, other employers, such as fast food employers and gas stations operators, can employ the minor at any hour, and are not required to provide return transportation. Arguably those employers are not similarly situated, but, clearly, newspapers who employ minors to solicit subscriptions are no different than magazines who employ minors to solicit subscriptions.

necessary to promote a compelling state interest in protecting minors; in fact, the classification defeats it by permitting the largest employer of minors in the state (newspapers) to continue employment which does not comport with any restrictions, reasonable or otherwise. Assuming, arguendo, that the rules do promote a compelling state interest, they could clearly have been more narrowly drawn. See, arguments, supra.

Even if fundamental rights are not involved, the discriminatory classification must still bear a rational relationship to a legitimate state interest. Campell v. Mincey, 413 F Supp 16, 22 (ND Miss, 1975), aff'd, 542 F 2d 583 (5th Cir, 1976). The Fourteenth Amendment denies states the power to discriminate between persons on the basis of criteria unrelated to the purpose of the statute. Eisenstadt v. Baird, supra at 447 n.7; Reed v. Reed, 404 US 71, 75-

76, 92 S Ct 251, 30 L Ed 2d 225 (1971). A statutory classification must be reasonable, not arbitrary, and rest on a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. Eisenstadt v. Baird, supra at 447. In Eisenstadt v. Baird, the Supreme Court held that a Massachusetts statute prohibiting distribution of contraceptives to all persons, except married persons, violated the equal protection clause of the Fourteenth Amendment because it was not rationally related to a legitimate state interest in encouraging continence and discouraging illicit sexual activity in that the statutory classification had only a marginal relation to the state's asserted goals. Eisenstadt v. Baird, supra at 448.

Former Rule 839-21-107, current 839-21-500, here discriminates against NWA and

the minors just as the Massachusetts statute discriminated against unmarried persons in Eisenstadt v. Baird. The substantive rule [former OAR 839-21-097(2) current 839-21-097(1), and OAR 839-21-265] also imposes unreasonable burdens on employers of door-to-door sellers (other than newspapers), not imposed on newspapers. If the state's asserted goal is protecting the safety of minors, it abandoned that goal by exempting the largest employer of minors door-to-door, newspapers, and 14 and 15 year-old minors selling in commercial areas.

In Aladdin's Castle, Inc. v. City of Mesquite, 630 F2d 1029 (5th Cir 1980), rev'd in part on other grounds and remanded, 455 US 283, 102 S Ct 1070, 71 L Ed 2d 152 (1982), former opinion adhered to, 713 F2d 137 (5th Cir), reh den en banc 718 F2d 1097 (5th Cir), motion to recall judgment den, 464 US 927, 104 S Ct 329, 78 L Ed 2d 300 (1983), a city ordinance made

it unlawful for a coin-operated amusement center to allow minors under the age of 17 to play the machines unless accompanied by a parent or guardian. The Fifth Circuit Court of Appeals concluded that the age restriction in the ordinance had no rational basis in light of the city's alleged interest in eliminating truancy. 630 F2d at 1039-40.

In this case, the distinction between minors who work for newspaper publishers and those who work for magazine publishers or other door-to-door sellers (or, for that matter, between minors 16 and 17 years old and minors under 16), has no rational basis in light of the state's asserted interest in protecting minors in employment. And, the history of the challenged rules establishes no basis in fact for any distinctions.[11] No evidence

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[11]Further, the only distinction between minors employed by newspapers made by the enabling statute, ORS 653.305, et seq, is in the hours of employment. ORS

was presented at the hearing held prior to promulgation of the challenged rule which established any basis for distinguishing minors who sell for newspaper publishers from those who sell for magazine publishers, charitable or religious organizations, or who sell for distributors of <u>other</u> household products (or for discriminating between 14 and 15 year olds who are not permitted to sell door-to-door, and 16 and 17 year olds who are under severe restrictions).

In reviewing the challenged rules, the Court of Appeals found that:

> The Bureau conducted a public hearing at which [witnesses] discussed their experiences with minors selling door-to-door. * * * no complaints about newspaper carriers or newspaper vendors were received. We conclude that the exemption of newspaper carriers and vendors in OAR 839-21-107 had a

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653.315 permits employment of minors by newspapers under 16 before 7 a.m. for the reason that newspapers are delivered before 7 a.m. Other than hours of employment, the statutes make no distinction.

> rational basis in the light of the enabling statute's purpose of promoting safe working conditions for minors." 96 Or App at 143, App-43.

First, assuming, arguendo, that the above statement were correct, it does not constitute a rational basis for a legislative distinction since there is no rational relationship between the distinction and any legitimate state interest in protecting minors. There are many employers of minors, in addition to newspapers, covered by the rule against whom no complaints have been made.

Second, and most importantly, the statement above is simply incorrect, and contrary to the admission of the state. The state admitted it received complaints about newspapers' employment of minors, but the state kept no records of the complaints, and refused to process or handle such complaints, because it exempts newspapers. For example, the Bureau of Labor acknowledged that complaint intake

personnel receive complaints, but are directed to tell any party complaining about newspaper employment practices that the Bureau has no "authority" over newspaper employers. As a result, the Bureau had no records of how many complaints it received, or the substance of any complaints. (Rec:1265, 1290, 2015-2027). Further, neither trial court judge in the circuit court held that newspapers were free of such complaints. Finally, although specifically directed to investigate newspapers' employment of minors during the same time when the challenged rule was being adopted, the Bureau failed to do so.

Third, the Court of Appeals' statement that witnesses at the hearing on adoption of the challenged rule established a rational basis for the distinction (96 Or App at 143) is contrary to the record (for a complete discussion, see pp. 3-7 above). As stated above, the two witnesses who

appeared offered no evidence to support a determination that door-to-door sales should be prohibited, or even specially regulated. And, the agency admitted that the only evidence it had to support the rule was the testimony at that hearing (TR: 429, 447, 478; Rec: 1196-1197, 1231,-1232, 2018-2020, 2022, 2040-2041).

The record establishes that the exemption for newspaper carriers and vendors is actually based on agency inertia in the face of the newspaper's political influence (Rec: 801; Rec: 2061-2062). The creation of such a special exemption is precisely the type of law the Equal Protection Clause of the Fourteenth Amendment protects against. The Fourteenth Amendment denies states the power to discriminate on the basis of criteria unrelated to the purpose of the statute. Eisenstadt v. Baird, supra at 447, n.7. The Fourteenth Amendment guarantees that persons similarly situated

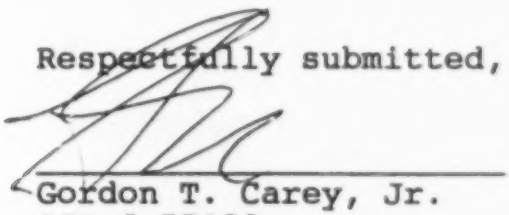
must be treated equally. Eisenstadt v. Baird, supra, at 447. The alleged purpose of OAR 839-21-097(2) and OAR 839-21-265 is to protect minors. There is no dispute that NWA would be exempt if the minors solicitated newspaper subscriptions instead of orders for other products (Resp. Br. in the Court of Appeals 56). Neither the Court of Appeals nor the State can explain how selling magazines as opposed to newspapers relates to the safety of the minors because there is no relation.

The court should grant the petition for certiorari because the decision of the Court of Appeals, which the Oregon Supreme Court declined to review, is in conflict with the decisions of this court and the federal courts of appeal cited above on an important point of federal law.

CONCLUSION

This court should grant the petition because the questions above deal with important constitutional rights of minors. The court has not fully articulated what rights of commercial free speech and equal protection a minor has.

Respectfully submitted,



Gordon T. Carey, Jr.
OSB # 77133
Attorney for Petitioner

A hearing on petitioners' right to hire minors was held on April 21, 1986, and July 14, 1986, and July 18, 1986 as follows:

BEFORE THE WAGE AND HOUR COMMISSION

OF THE STATE OF OREGON

In the Matter of:	
	No. 01/86 (Amended)
NORTHWEST ADVANCEMENT, INC., JEFF HENKE, JOE GEER, and TIM COX	RULINGS ON MOTIONS FINDINGS OF FACT CONCLUSIONS OF LAW OPINION ORDER

. . .

The Commisioner, per the administrative law judge, made certain findings not here material, and then made certain conlusions of law, the material portions of which are reprinted below:

CONCLUSIONS OF LAW

1.) At all times material herein Respondents were subject to the provisions of ORS 653.305 to 653.370 [governing the

employment of minors] and the administrative rules adopted thereunder.

2.) The Commissioner of the Agency of the State of Oregon has jurisdiction over the persons and subject matter herein for the purpose of determining whether the right of Northwest Advancement, Inc., Jeff Henke, Joe Geer, and Tim Cox to hire minors shall be revoked.

. . .

4.) The provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder, OAR 839-21-005 to and including 839-21-380, apply to the actions of Respondents and each of them in these matters.

5.) The actions of Respondents Joe Geer, Respondent Tim Cox, and Respondent Jeff Henke, when acting as a crew chief, are attributable to Northwest Advancement, Inc. The actions of Respondents Joe Geer, Tim Cox, and Jeff Henke in employing minors were done in the furtherance of

Northwest Advancement's business interests rather than in the furtherance of the separate business interests of Mr. Geer, Mr. Cox, or Mr. Henke. Respondents Joe Geer, Tim Cox, and Jeff Henke were not acting as independent contractors when engaged in securing and using the services of minors to sell the boxes of cookies and candy but rather were working as commissioned salesmen for Northwest Advancement, Inc.

6.) The minors working on behalf of the business interests of Northwest Advancement, Inc., were not independent contractors acting in furtherance of their own business interests but rather were working as commissioned sales persons. Therefore these minors were employees and the child labor laws apply to them.

7.) The Respondents, and each of them, voilated the provisions of ORS 653.305 et seq. and OAR 839-21-005 et seq. in their employment of minors as door-to-

door sales persons as specifically set out in the Ultimate Findings of Fact.

8.) Under ORS 653.307(2) and the facts and circumstances of the record in these proceedings, the Wage and Hour Commission has the authority and the power to revoke the right of Northwest Advancement, Inc., Jeff Henke, Joe Geer, and Tim Cox to hire minors in the future.

* * *

The administrative law judge also rendered the following opinion, the material portions of which are reprinted below:

OPINION

. . .

A number of legal issues were raised by the Respondents at the beginning of the hearing. In addition to the issue of whether the crew chiefs and minors who sold the candy and cookies were acting as independent contractors rather than employees of Northwest Advancement, Inc.,

the Respondents raised the issue of whether or not Oregon's child labor laws deprived the Respondents and the minors of their constitutional rights to commercial free speech. Aside from the lack of merit of Respondents' arguments on this issue it is neither within the province nor the inclination of this forum to declare that its own rules are violative of constitutional guarantees. This forum was advised by letter, dated April 18, 1986, from the Department of Justice, that the child labor statutes and regulations are "constitutionally sound as written, and as applied."

Moreover, the same issues of constitutionality raised herein were raised by Respondents and ruled upon by the Circuit Court of Marion County in a letter opinion dated June 10, 1986. The Court concluded therein as follows:

> "Next it is my interpretation and opinion of the legislation that the rules and regulations adopted by

> defendant are within the statutory authority. I therefore reject Plaintiff's contention of ultra vires. I also believe that Plaintiff's `Free Speech' argument is not well taken.
>
> The most bothersome area is that of the exemptions granted by the legislature and the Defendant to newspaper carriers or vendors. I conclude that these exemptions are severable and if invalid do not require invalidation of all of the general statutes and rules restricting child labor. I further conclude that there is a valid classification/distinction between newspaper carriers and other child labor. I therefore do not find any invalid discrimination.
>
> In summary my review leads me to the general conclusion that the statutes in question and rules adopted are valid as applied to the Plaintiff's" Northwest Advancement vs. State of Oregon, #851052 (June 10, 1986)

On April 7, 1986, the circuit court of Multnomah County also issued a letter opinion in a separate action upholding the statutes and regulations challenged herein. The Court determined that the Wage and Hour Commission had the authority to regulate the activities of children engaged in outside sales and that the

regulations sought to be enforced fell within that authority. In so doing, the Court stated:

> "Defendants argue that the exemption from regulation which is enjoyed by newspaper carriers and sales people is an arbitrary and discriminatory exemption and the regulations are void by reason of selective enforcement. I find no merit in this contention. I also find no merit in defendants' other two contentions, namely that the regulations violate rights of free speech and that they deny to children under 16 the equal protection of the laws." State of Oregon, ex rel Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor and Industries, and the Wage and Hour Commission of the State of Oregon V. Northwest Advancement, Inc., Case No. A8601004011 (April 7, 1986)

It is understood, however, that as a legal matter it may have been necessary to raise these separate legal and constitutional issues in this forum and thereby preserve them for some later possible judicial proceeding. The record reflects that these issues have been raised, notwithstanding that the

resolution of those issues is outside the scope of this contested case proceeding.

ORDER

NOW, THEREFORE, as authorized by ORS 653.307 (2) and in order to protect the interest of minors in Oregon who may be employed in the future, the right of Respondents Northwest Advancement, Inc., Jeff Henke, Joe Geer and Tim Cox to employ minors shall be and hereby is revoked.

DATED THIS 20th day of November, 1986.

/s/ JoAnne Beilke
JoAnne Beilke,
Chair Wage and
Hour Commission

/s/ Frank De Cius
Frank De Cius, Member
Wage and Hour
Commission

/s/ Richard Edgington
Richard Edgington,
Member Wage and Hour
Commission

* * *

On the same dates, before the same administrative law judge, a hearing was

held on certain penalties imposed by the Bureau of Labor as follows:

BEFORE THE COMMISSIONER
OF THE OREGON
BUREAU OF LABOR AND INDUSTRIES

In the Matter of Civil Imposition of a Penalty Against NORTHWEST ADVANCEMENT, INC., JEFF HENKE, AND JOE GEER AND TIM COX	) No. CL01/86 and 02/86)) FINDINGS OF FACT) ULTIMATE FINDINGS OF FACT) CONCLUSIONS OF LAW) OPINION) ORDER

. . .

After she made certain findings not here material, the Bureau, per the administrative law judge, made certain conclusions of law, the material portions of which are reprinted below:

CONCLUSIONS OF LAW

1.) At all times material herein Respondents were subject to the provisions of ORS 653.305 to 653.370 [governing the employment of minors] and the administrative rules adopted thereunder.

2.) The Commissioner of the Agency of the State of Oregon has jurisdiction over the persons and subject matter herein.

. . .

4.) The provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder, OAR 839-21-005 to and including 839-21-380, apply to the actions of Respondents and each of them in these matters.

5.) The actions of Respondents Joe Geer, Tim Cox and Jeff Henke, when acting as a crew chief, are attributable to NWA. The actions of Respondents Joe Geer, Tim Cox and Jeff Henke in employing minors were done in the furtherance of NWA's business interests rather than in the furtherance of the separate business interests of Mr. Geer, Mr. Cox or Mr. Henke. Respondents Joe Geer, Tim Cox and Jeff Henke were not acting as independent contractors when engaged in securing and using the services of minors to sell the

boxes of cookies and candy but rather were working as commissioned salesmen for NWA.

6.) The minors working on behalf of the business interests of NWA were not independent contractors acting in furtherance of their own business interests but rather were working as commissioned sales persons. Therefore these minors were employees and the child labor laws apply to them.

. . .

8.) Oregon Administrative Rule 839-21-097(2)(c) and 839-21-265(1) prohibit the employment of minors under the age of 16 as door-to-door sales persons. Respondents and each of them violated these rules by employing the following minors under the age of 16 as door-to-door sales persons: Genita Noheart, Scotty Dunbar, Tanya Dow, Julie Walter, Mike Menlow, Lisa Marks, Joe Jenson, and Robert Bray.

. . .

12.) OAR 839-21-265(13) requires a employer to provide transportation to and from the job site for all minors employed as door-to-door sales persons. Respondents and each of them violated the provisions of this rule by failing to provide transportation from the job site for the following minors: Genita Noheart, Lyssa Thomas, Cara Ruff and Julie Walter.

. . .

15.) OAR 839-21-265(11) requires that an employer who employs a minor as a door-to-door sales person must provide such minor, before the minor begins work, with an identification card. Respondents and each of them violated the provisions of this rule by employing the following minors as door-to-door sales persons without obtaining identification cards: Genita Noheart, Lyssa Thomas, Cara Ruff, Jay Phillips, Scotty Dunbar, Julie Walter, Rob Bray, Mike Menlow, Lisa Marks and Demond Clark. The Respondents did not

violate provisions of this rule with respect to the following persons: Jolanda Clark, Kevin Johnson, Jason Allen, "Joe" or "Steve".

16.) Under ORS 653.370 and the facts and circumstances of the record in these proceedings, the Commissioner has the authority and the power to impose and direct payment of civil penalties against Respondents and each of them as follows:

Order CL01/86

(Northwest Advancement, Inc., Jeff Henke and Joe Geer)

A) $3,000 for three violations ($1,000 each) for employing minors under the age of 14.

B) $2,250 for three violations ($750 each) for employing minors under the age of 16 as door-to-door sales persons.

C) $5,000 for 16 violations for employing minors under the age of 18 after 6:00 pm. This total includes seven violations ($200 each) for minors who

worked past 6:00 pm and nine violations ($400 each) for minors who worked past 9:00 pm.

D) $9,000 for nine violations ($1,000 each) for taking minors out of state without prior written parental permission.

E) $4,000 for four violations ($1,000 each) for failure to provide transportation for minors to and from the job site.

F) $1,250 for five violations ($250 each) for employing minors without work permits.

G) $3,000 for three violations ($1,000 each) for failure to file an employer certification within 48 hours of employing a minor.

H) $1,250 for five violations ($250) for employing minors as door-to-door sales persons who did not have identification cards.

Order CL02/86

(Northwest Advancement, Inc., Jeff Henke and Tim Cox)

A) $1,000 for one violation for employing a minor under the age of 14.

B) $3,750 for five violations ($750 each) for employing minors under the age of 16 as door-to-door sales persons.

C) $1,800 for employing minors past 6:00 pm and employing a minor more than 10 hours a day. There were two violations for employing a minor after 9:00 pm ($400 each) and one violation ($1,000 each) for employing a minor for more than 10 hours a day.

D) $3,000 for three violations ($1000 each) for failure to provide transportation for minors to and from the job site.

E) $1,000 for four violations ($250 each) for employing minors without a work permit.

F) $5,000 for five violations ($1,000 each) for failure to file an employer certification within 48 hours of employing a minor.

G) $1,250 for five violations ($250 each) for employing minors as door-to-door sales persons who did not have identification cards.

* * *

The administrative law judge also rendered the following opinion, the material portions of which are reprinted below:

OPINION

(The following is identical to that portion of the Opinion she rendered in Commission Case No. 01/86, reprinted above):

A number of legal issues were raised by the Respondents at the beginning of the hearing. In addition to the issue of whether the crew chiefs and minors who sold the candy and cookies were acting as

independent contractors rather than employees of NWA, the Respondents raised the issue of whether or not Oregon's child labor laws deprived the Respondents and the minors of their constitutional rights to commercial free speech. Aside from the lack of merit of Respondents' arguments on this issue it is not, in this case, within the province of this forum to declare that its own rules are violative of constitutional guarantees. This forum was advised by letter, dated April 18, 1986, from the Department of Justice, that the child labor statutes and regulations are "constitutionally sound as written, and as applied."

Moreover, the same issues of constitutionality raised herein were raised by Respondents and ruled upon by the Circuit Court of Marion County in a letter opinion dated June 10, 1986. The Court concluded therein as follows:

> "Next it is my interpretation and opinion of the legislation that the rules and regulations adopted by defendant are within the statutory authority. I therefore reject Plaintiff's contention of ultra vires. I also believe that Plaintiff's `Free Speech' argument is not well taken.
>
> The most bothersome area is that of the exemptions granted by the legislature and the Defendant to newspaper carriers or vendors. I conclude that these exemptions are severable and if invalid do not require invalidation of all of the general statutes and rules restricting child labor. I further conclude that there is a valid classification/distinction between newspaper carriers and other child labor. I therefore do not find any invalid discrimination.
>
> In summary my review leads me to the general conclusion that the statutes in question and rules adopted are valid as applied to the Plaintiff's" Northwest Advancement vs. State of Oregon, #851052 (June 10, 1986)"

In a separate action involving Respondents, the Circuit Court of Multnomah County also issued a letter opinion dated April 7, 1986, in a separate action upholding the statutes and regulations challenged herein. The Court determined that the Wage and Hour

Commission had the authority to regulate the activities of children engaged in outside sales and that the regulations sought to be enforced fell within that authority. In so doing, the Court stated:

> "Defendants argue that the exemption from regulation which is enjoyed by newspaper carriers and sales people is an arbitrary and discriminatory exemption and the regulations are void by reason of selective enforcement. I find no merit in this contention. I also find no merit in defendants' other two contentions, namely that the regulations violate rights of free speech and that they deny to children under 16 the equal protection of the laws." State of Oregon, ex rel Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor and Industries, and the Wage and Hour Commission of the State of Oregon V. Northwest Advancement, Inc., Case No. A8601004011 (April 7, 1986)

It is understood, however, that as a legal matter it may have been necessary to raise these separate legal and constitutional issues in this forum and thereby preserve them for some later possible judicial proceeding. The record reflects that these issues have been

raised, notwithstanding that the resolution of those issues is outside the scope of this contested case proceeding.

ORDER

NOW, THEREFORE, as authorized by ORS 653.370 and in order to penalize the Respondents and each of them for commission of the unlawful employment practices as outlined above, as well as to protect the future interests of other minors similarly situated, Respondents are hereby ordered to deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, 1400 S.W. Fifth Avenue Room 309, Portland, Oregon the total amount of **FORTY-FIVE THOUSAND FIVE HUNDRED FIFTY DOLLARS ($45,500.00).**

_____

MARY WENDY ROBERTS, Commissioner
Bureau of Labor and Industries

* * *

Upon appeal by petitioners from both the Commission's order revoking petitioners' right to hire minors (No. 01/86), and the Bureau's orders imposing civil penalties (No. CL01/86 and CL02/86), the Oregon Court of Appeals issued the following opinion on April 12, 1989. It is reported at 96 Or. App. 146, 772 P.2d 934 (1989):

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

NORTHWEST ADVANCEMENT, INC., JEFF HENKE, JOE GEER and TIM COX,

Petitioners,

v.

WAGE AND HOUR COMMISSION,

Respondent.

NORTHWEST ADVANCEMENT, INC., JOE GEER and TIM COX,

Petitioners,

v.

BUREAU OF LABOR AND
INDUSTRIES,

Respondent.

(01/86, CL01/86, CL02/86;
CA A42520 (Control), CA A42899)

(Cases consolidated)

Judicial Review from Bureau of Labor and Industries and from Wage and Hour Commission.

Argued and submitted May 23, 1988.

Gordon T. Carey, Jr., Portland, argued the cause and filed the brief for petitioners.

Douglas F. Zier, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

DEITS, J.

Affirmed.

FILED: April 12, 1989

Deits, J.

Petitioners seek review of final orders issued by the Bureau of Labor and Industries (Bureau) and the Wage and Hour

Commission (WHC). The orders followed a consolidated hearing held by Bureau and WHC concerning alleged violations of statutes and regulations governing the employment of minors. Bureau's order imposed civil penalties pursuant to ORS 653.370 that totaled $45,550, while WHC's order revoked their right to hire minors in the future, pursuant to ORS 653.370(2). Both orders were based on 75 proven violations of the statutes and regulations. We affirm.

1. Most of the assignments of error in this case have been addressed in Northwest Advancement v. Bureau of Labor, 96 Or App 133, 772 P2d 943 (1989). In that case, we upheld the agencies' application of the regulations and the issuance of a mandatory injunction requiring petitioners to comply with the regulations. Petitioners argue here that their activities are subject to regulation under the Fair Labor Standards Act (FLSA),

and that Bureau and WHC therefore lacked authority to impose civil penalties or to revoke their right to hire minors. That issue was not raised before either Bureau or WHC, and we will not entertain it for the first time on appeal. See Hughes v. Adult & Family Services, 58 Or App 478, 484, 648 P2d 1324 (1982).

Petitioners also argue that Bureau erred in finding separate violations for separate offenses involving the same minors. They also assert that it erred in finding separate violations for each day that a regulation was violated. We disagree. ORS 653.370(1) provides:

> "In addition to any other penalty provided by law, [Bureau] may impose upon any person not regulated under [FLSA] who violates ORS 653.305 to 653.370 or any rule adopted by [WHC] thereunder, a civil penalty not to exceed $1,000 for each violation." (Emphasis supplied.)

Criminal sanctions are also available under ORS 653.991, which provides:

> "Violation of any provision of this section or ORS 653.010 to 653.545 or of any rule or regulation adopted by the commission under ORS 653.307 shall be punishable as a misdemeanor." (Emphasis supplied.)

We conclude that the language of the statutes clearly indicates that the legislature intended to allow separate punishment for each violation.[1]

Affirmed.

* * *

The above Opinion relies in large part on the analysis stated in the opinion in the companion cases of Northwest Advancement et al. v. State of Oregon, et al., 96 Or. App. 133, 772 P.2d 943 (1989). Therefore, that Opinion is reprinted below:

IN THE COURT OF APPEALS OF

THE STATE OF OREGON

NORTHWEST ADVANCEMENT, INC., and NANCY LOUISE MARK, Guardian ad litem for TANYA SUE DOW,

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[1] Petitioners' remaining assignments of error do not merit discussion

Appellants,

v.

STATE OF OREGON,
Bureau of Labor,
Wage and Hour Division,

Respondent.

STATE OF OREGON, ex rel
MARY WENDY ROBERTS,
Commissioner of the Oregon
Bureau of Labor and Industries,
and the WAGE AND HOUR
COMMISSION of the State of
Oregon,

Respondents,

v.

NORTHWEST ADVANCEMENT, INC.,
JEFF HENKE, JOE GEER and
TIM COX,

Appellants.

(Marion County 85-1052, Multnomah County 8601-00401; CA A41042 (Control), CA A41109 (Cases Consolidated)

DEITS, J.

Appellants in these consolidated appeals seek review of two judgments entered in separate counties. In

Northwest Advancement v. Bureau of Labor, the Marion County Circuit Court entered a summary judgment for the state in appellants' declaratory judgment action challenging the validity of regulations promulgated by the Oregon Wage and Hour Commission (WHC). In State ex rel Roberts v. Northwest Advancement, the Multnomah County Circuit Court granted the state's request for a permanent mandatory injunction requiring appellants to comply with the challenged regulations. We affirm both judgments.[2]

Appellant Northwest Advancement Inc. (NWA) is an Oregon corporation engaged in the wholesale distribution of candy and various household products. Appellant Henke is NWA's president and sole

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[2] Appellants also challenge two final orders issued by the Bureau and WHC that imposed civil penalties for violations of the regulations and revoked their right to hire minors in the future. That administrative law review is Northwest Advancement v. Wage and Hour Comm., 133 Or App 772, P2d 943 (1989).

shareholder. NWA distributes its products primarily through door-to-door sales by minors. The minors are recruited by Henke and his "crew chiefs," whom Henke himself recruits. Appellants Geer and Cox were both NWA crew chiefs and were responsible for transporting minors to and from neighborhoods where they sold NWA's products.

In 1985, WHC promulgated administrative rules regulating the employment of minors as canvassers, peddlers or outside house-to-house salesmen. Appellants NWA and Nancy Louise Mark, guardian ad litem for one of the minors working for NWA, filed an action in Marion County seeking a declaratory judgment that the regulations were invalid.[3] While that action was

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[3] At issue in these appeals are OAR 839-21-097(1)(c), which prohibits the employment of minors under 16 years of age as door -to-door salespersons; OAR 839-21-265(1)-(10), which requires employers to register with the Bureau any minors

pending, the Bureau of Labor and Industries (Bureau) filed a separate action in Multnomah County seeking preliminary and mandatory injunctions requiring NWA and its crew chiefs to comply with the regulations. The Marion County Circuit Court entered a summary judgment for the state, and the Multnomah County Circuit Court granted the state's request for an injunction. Appellants challenge both judgments.

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ages 16-18 who are employed in those capacities; OAR 839-21-265(11), which requires such minors to wear identification cards bearing certain information; OAR 839-21-265(12), which prohibits employment of such minors after 9 o'clock at night; OAR 839-21-265(13), which requires employers to provide such minors with transportation home by 9:00 at night; OAR 839-21-265(14), which prohibits employers from transporting such minors to another state without the written consent of their parents; and former OAR 839-21-107, which, at the time these actions were commenced, exempted from coverage of the other rules minors employed as newspaper carriers or newspaper vendors.

Appellants first argue that the Multnomah court erred in concluding that the NWA sales operation was governed by the statutes and administrative rules relating to the employment of minors, because NWA does not "employ" minors as that term is used in ORS 653.305,[4] the enabling statute for the challenged

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[4] ORS 653.305 provides:

"(1) The commission may at any time inquire into wages or hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors.

"(2) When the commission has made such determination, it may issue an obligatory order in compliance with ORS 183.310 to 183.550.

"(3) After such order is effective, no employer in the occupation affected shall employ a minor for more hours or under different conditions of labor than are specified or required by the order; but no such order nor the commission shall authorize or permit the employment of any minor for more hours per day or per week than the maximum fixed by law or at times or under conditions prohibited by law."

regulations. They assert that the minors and crew chiefs are independent contractors and are, therefore, exempt from the regulations. We disagree. Although appellants and the state differ over the meaning of "employ" and "employer" as used in ORS 653.305,[5] under either party's definitions of those terms the minors in this case were employees.

ORS 653.010, which the state argues applies to ORS 653.305, defines "employ" as "suffer or permit to work," and "employer" as "any person who employs another person." Although no Oregon cases have further refined those terms, federal

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[5] The state argues that the definitions of "employ" and "employer" contained in ORS 653.010, the language of which was taken from the federal Fair Labor Standards Act, apply to ORS 653.305. On the other hand, appellants argue that those definitions do not apply because the clause preceding ORS 653.010 begins with, "[a]s used in ORS 653.010 to 653.261 * * * ." They argue instead that the common law distinction between an employee and an independent contractor should control.

regulations and case law interpreting the same terms under the Fair Labor Standards Act, after which most of ORS chapter 653 is patterned, are instructive. For example, 29 CFR § 570.113, relating to the definitions of "employ" and "employer" for purposes of child labor law under FLSA, states:

> "The nature of an employer-employee relationship is ordinarily to be determined not solely on the basis of the contractual relationship between the parties but also in the light of all the facts and circumstances. Moreover, the terms "employer" and "employ" as used in the Act are broader than the common-law concept of employment and must be interpreted broadly in the light of the mischief to be corrected. Thus, neither the technical relationship between the parties nor the fact that the minor is unsupervised or receives no compensation is controlling in determining whether an employer-employee relationship exists * * *."

In Wirtz v. Keystone Readers Service, Inc, 282 F Supp 871 (SD Fla), aff'd 418 F2d 249 (5th Cir 1968), the court addressed an employment scheme nearly

identical to the one in this case. In Wirtz, a magazine distributor hired "student salesman" to work after school and on weekends soliciting magazine subscriptions door-to-door. The principal officer and shareholder of the defendant corporation either interviewed and trained the minors himself or supervised a "student manager" who did. During the training process, the minors had to memorize a sales speech that he provided. After reporting to the defendant's office each day, the minors were transported in cars driven by "student managers" to designated neighborhoods, where they would "fan out" and solicit subscriptions. At the end of the day, the minors met the "student managers" at a designated place and then were transported back to the defendant's office. There, the minors would turn in their subscriptions and receive a commission based on the volume

of sales. On those facts, the court concluded that the minors were employees for the purposes of FLSA. The court observed that "[w]hen work done, in its essence, follows the usual path of an employee, putting on an `independent contractor' label does not take the worker from the protection of the Act." 282 F Supp at 874. We conclude that, if the FLSA definitions of employ and employer contained in ORS 653.010 apply in this case, the minors and crew chiefs are employees.

However, even assuming that appellants are correct in their assertion that the FLSA definitions incorporated in ORS 653.010 do not apply to ORS 653.305, and that we therefore must turn to the common law distinction between employees and independent contractors, we conclude that the minors and crew chiefs in this case were still employees. At common law, the

question of whether an independent contractor relationship exists focuses primarily on whether the worker is subject to the principal's direction and control. See, e.g., Restatement (Second) Agency, § 2(3) (1958); Nordling v. Johnston, 205 Or 315, 332, 283 P2d 994 (1955). In this case, both the crew chiefs and the minors were subject to the direction and control of Henke and, therefore, of NWA. Henke interviewed and trained the minors in their sales techniques, giving them standardized sales speeches to memorize. He assigned the crew chiefs specific territories in which to operate. The minors did not choose the neighborhoods in which they sold NWA products, but rather were driven to and from areas selected by Henke and the crew chiefs. Although the crew chiefs and the minors were paid on commission and not on an hourly basis, neither was at financial risk, because

they did not purchase the product in advance and were allowed to return all unsold inventory. Finally, the NWA logo was printed on all advertising materials used by the minors to promote sales. We conclude that both the minors and the crew chiefs are employees for purpose of ORS 653.305.

Appellants next argue that both courts erred in concluding that the Bureau did not exceed its authority under ORS 653.305(1) when it promulgated OAR 839-21-0097(1)(c), which prohibits the employment of minors under 16 years of age as door-to-door salespersons.[6] ORS

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[6] Appellants also argue that the Bureau exceeded its authority under ORS 653.305(1) when it promulgated former OAR 839-21-107, which exempted from regulation minors employed as newspaper carriers or vendors. We do not consider the merits of that argument. Assuming, without deciding, that WHC's promulgation of that rule was beyond the scope of its authority, invalidating the rule would have had absolutely no effect on the outcome of this case. For the same

653.305(1) provides that WHC may at any time "inquire into wages or hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors." Appellants argue that the statute only authorizes WHC to establish suitable hours of employment, not to prohibit employment altogether. Again, we disagree.

Appellants rely on Ore. Newspaper Pub. v. Peterson, 244 Or 116, 415 P2d 21 (1966), for the proposition that a grant of power to "regulate" does not include the power to "prohibit." The holding in Peterson, however, is not that broad. In Peterson, the legislature had authorized the Board of Pharmacy to "make

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reason, we also decline to consider the merits of appellants' attack on former OAR 839-21-107 as being arbitrary. Their claim that the other regulations are also arbitrary is without merit.

regulations, necessary for the protection of the public, pertaining to the practice of pharmacy" and to "[r]egulate the practice of pharmacy." Former ORS 689.620. Pursuant to that statute, the Board promulgated a regulation prohibiting the public advertisement of prescription drugs. The Supreme Court held that the regulation exceeded the scope of the enabling statute, because "[n]othing in ORS 689.620 or elsewhere in the same chapter suggests that advertising was contemplated as a proper subject of regulation." 244 Or at 124. The court did not, as appellants argue here, hold that the legislature's use of the term "regulate" prevents an agency from "prohibiting." Rather, the court held that the power to regulate one area, pharmacy, does not by implication include the power to regulate another area, advertising. In this case, the

legislature authorized WHC to determine suitable hours of employment for minors and to promulgate rules regulating those hours. Under that delegation of authority, WHC had the ability to determine that no suitable hours of employment exist for certain minors in certain occupations, and to promulgate rules to that effect.[7]

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[7] Appellants argue that WHC did not conduct a sufficient investigation of employment conditions before promulgating the rules under challenge. However, even assuming that an investigation is a prerequisite to WHC's authority to promulgate rules, see Fund for Animals v. Dept. of Fish & Wildlife, 94 Or App 211, 765 P2d 215 (1988), the investigation in this case was sufficient. As discussed below, the record indicates that WHC held a public hearing at which representatives from the Better Business Bureau, the Multnomah County District Attorney's Office and the Hillsboro Police Department discussed their experiences with minors selling door-to-door. In addition, WHC officials prepared a report detailing the extent and manner in which major Oregon newspapers use minors in their distribution process.

Appellants also assign error to the Multnomah court's decisions to close the record after the last day of hearings and

Appellants next argue that both courts erred in rejecting their argument that the challenged regulations violate their rights to free speech under Article I, section 8, of the Oregon Constitution and the First and Fourteenth Amendments. Under the Oregon Constitution, commercial speech is afforded the same protection as noncommercial speech. Ackerly Communications, Inc. v. Mult. Co., 72 Or App 617, 696 P2d 1140 (1985), rev dismissed, 303 Or 165 (1987). In City of Hillsboro v. Purcell, 306 Or 547, 761 P2d 510 (1988), the Supreme Court held unconstitutional a city ordinance banning all door-to-door sales of goods in residential areas:

> "The relevant distinction is between outright prohibitions--either criminal or civil--on the one hand,

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to exclude testimony regarding the employment practices of newspapers. We conclude that the court did not abuse its discretion in those rulings.

> and regulations that do not foreclose expression entirely but regulate when, where and how it can occur. Prohibiting expression by making certain speech or writing criminal, * * * or imposing and oppressive licensing procedure * * * are examples of the former. [A] zoning ordinance [regulating the location of adult bookstores] is an example of the latter. With regard to these latter regulations, even free speech activities `are not immune from regulations imposed for reasons other than the substance of their particular message.' In either case, laws must proscribe harm rather than expression itself." 306 Or at 554. (Citations and footnote omitted.)

The court invalidated the ordinance in Purcell on the ground that it was overbroad under Article I, section 8:

> "The ordinance is overbroad, not because it regulates solicitation for one purpose differently from another, but because it prohibits all solicitation for any purpose at any time. The ordinance as written is broad enough to preclude any person or group form approaching a door in a residential neighborhood to solicit financial support for any purpose through the sale of merchandise. This is far more than a regulation limited to and contained by the consequences the law seeks to prevent.

"* * * * *

> "The city impermissibly has prohibited all persons from approaching people in their homes at any time to sell merchandise. We do not suggest that the city could not place reasonable limitations on door-to-door solicitations. The city may yet choose to regulate, rather than totally proscribe, door-to-door solicitations. It has not yet done so." 306 Or at 556.

The challenged regulations in this case do not prohibit "all solicitation for any purpose at any time." Rather, they prohibit only door-to-door solicitation by some people (minors under age 16) all of the time and door-to-door solicitation by other people (minors age 16 and older) some of the time. Nothing in the challenged regulations prevents adults from soliciting door-to-door at any time. Similarly, nothing in the challenged regulations prevents minors age 14 to 16 from soliciting in public places, such as shopping malls. Further, unlike the city ordinance in Purcell, the regulations in

this case are not directed toward the content of the speech, but only toward the employment of minors. We conclude, therefore that they do not violate Article I, section 8.

Unlike under the Oregon Constitution, commercial speech under the First Amendment to the United States Constitution is accorded less protection than noncommercial speech. Metromedia, Inc. v. San Diego, 453 US 490, 504-06, 101 S Ct 2882, 69 L Ed 2d 800 (1981); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 US 557, 562-63, 100 S Ct 2343, 65 L Ed 2d 341 (1980). In Metromedia, the Supreme Court articulated a four-part test for determining the validity of government restrictions on commercial speech:

> "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial

> speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." 453 US at 507 (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra).

We conclude that the challenged regulations meet that test. First, they are directed toward improving the working conditions of minors, which is a substantial governmental interest. Second, they directly advance that interest by prohibiting the employment of some minors under certain conditions and by restricting the employment of other minors under other conditions. Third, they reach no further than necessary to accomplish the governmental interest, because they permit the employment of minors 16 years of age and older as door-to-door salespersons under certain circumstances, of minors 14 to 16 years of age as salespersons in other circumstances

and of adults as salespersons in all circumstances. Accordingly, we hold that the regulations do not violate appellants' rights under the First Amendment.

Appellants next argue that the courts erred in rejecting their argument that the challenged regulations violate their right to equal privileges and immunities under Article I, section 20, and to equal protection under the Fourteenth Amendment. Specifically, they argue that the exemption granted to newspaper carriers and vendors constitutes impermissible class legislation. In order to succeed in their Article I, section 20, challenge, appellants must show, (1) that another group has been granted a "privilege" or "immunity" that their group has not been granted, (2) that the regulations discriminate against a "true class" on the basis of characteristics that they have apart from the regulations themselves and

(3) that the distinction between classes either is impermissibly based on persons' immutable characteristics and reflects "invidious" social or political premises or has no rational foundation in light of the enabling statute's purposes.[8] Jungen v. State of Oregon, 94 Or App 101, 105, 764 P2d 938 (1988).

Former OAR 839-21-107 provided that minors employed as newspaper carriers and newspaper vendors were not subject to the administrative regulations promulgated

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[8] Respondent argues that NWA does not have standing to assert a violation of rights under Article I, section 20, because those rights extend only to "citizens" and NWA, as a corporation, is not a "citizen." See State v. James, 189 Or 268, 219 P2d 756 (1950); but see Salem College & Academy, Inc. v. Emp. Div., 298 Or 471, 488 n 13, 695 P2d 25 (1985). Because we conclude that any rights NWA might have under Article I, section 20, were not violated, we need not resolve that issue. In any event, the other appellants clearly have standing to assert a violation of that constitutional provision.

under ORS 653.305.[9] Exemption from regulation is clearly an immunity to which Article I, section 20, analysis applies. Thus, the first element is satisfied. In addition, newspaper carriers and vendors are a "true class" in the sense that they are identified in the regulation by characteristics which they have apart from the regulation itself, i.e., the sale and distribution of a particular product. See State v. Clark, 291 Or 231, 240-41, 630 P2d 810, cert den sub nom Clark v. Oregon, 454 US 1084 (1981). Thus, the second element is also satisfied. However, the classification is not based on immutable characteristics reflecting invidious social or political premises. Any person wishing to come within the favored class of newspaper carriers and vendors may do

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[9] Minors employed "at domestic work and chores in or about private residences" were also exempted under that regulation.

so by engaging in that occupation. Accordingly, the first prong of the third element is not present. The only remaining question, then, is whether the classification lacks a rational foundation in the light of the statute's purposes. Jungen v. State of Oregon, supra, 94 Or App at 105.

Appellants argue that there is no rational distinction between the distribution of newspapers and the distribution of household products or candy. The Bureau's regulation of the door-to-door sales of candy and other products is based on its determination that that particular activity by minors is sufficiently dangerous to require additional regulation. That determination is supported by the record. Bureau officials testified in these cases that, before promulgating the challenged regulations, they had received

intensifying complaints from the public and from parents about young children selling products door-to-door in the Portland and Salem areas. The complaints were that the children were working very late at night, that they were sometimes abandoned far from their homes and that they were also sometimes transported to Washington without their parents' permission. The officials testified that no similar complaints were received regarding newspaper carriers or newspaper vendors.[10] In addition, the Bureau conducted a public hearing at which representatives of the Better Business Bureau, the Multnomah County District Attorney's office and the Hillsboro Police

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[10] Bureau officials testified that they had received complaints about newspaper carriers and vendors "from time to time" in the past, but that the complaints that prompted the challenged regulations all involved sales of household products and candy.

Department discussed their experiences with minors selling door-to-door. Again, no complaints about newspaper carriers or newspaper vendors were received. We conclude that the exemption of newspaper carriers and vendors in OAR 839-21-107 had a rational basis in the light of the enabling statute's purpose of promoting safe working conditions for minors.

Appellants also argue that OAR 839-21-107 violates their rights to equal protection under the Fourteenth Amendment. They assert that the challenged regulations should be subjected to strict scrutiny because they address fundamental rights to engage in commercial speech and to engage in a particular occupation. However, as discussed supra, we conclude that the challenged regulations are permissibly directed at the employment of certain minors in certain occupations, not at the content of their speech. Further,

a minor's right to be employed as a door-to-door salesperson during certain hours or at a certain age is not a fundamental right for purposes of equal protection clause of the Fourteenth Amendment. Cf. New Orleans v. Dukes 427 US 297, 96 S Ct 2513, 49 L Ed 2d 511 (1976) (right to be employed as a pushcart vendor is not a fundamental right). Because no fundamental interests are addressed by the challenged regulations, they need only have a rational basis to withstand Fourteenth Amendment scrutiny. We conclude that, for the same reasons stated in our analysis of Article I, section 20, the challenged regulations are rationally related to the purposes of the enabling statute.

Appellants next argue that the Multnomah court erred in granting the state's request for a permanent mandatory injunction requiring them to comply with

the challenged regulations. They argue that the Bureau does not have authority to seek injunctive relief, or in the alternative, that injunctive relief was not appropriate in this case.[11] ORS 651.050 authorizes the Commissioner to "cause to be enforced * * * all laws regulating the employment of minors [and] all laws enacted for the protection of employees." ORS 653.535 authorizes WHC to "take such steps as may be necessary to

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[11] Appellants also argue that injunctive relief was improper because one of the regulations that they were charged with violating is unconstitutionally vague. That regulation, OAR 839-21-265(13), provides that the return transportation of a minor shall "occur no later than 9:00 o'clock at night." They argue that, under the quoted language, it is unclear whether the transportation must end or begin by 9:00 o'clock. However, OAR 839-21-265(12) provides that minor door-to-door peddlers "shall not be employed past the hour of 9:00 o'clock at night." When read in conjunction with that regulation, the plain meaning of OAR 839-21-265(13) is clear: transportation is part of employment, and employed minors must be returned home by 9:00.

prosecute such employers as are not observing or complying with its orders." Implicit in those broad grants of authority is the ability to seek injunctive relief.

Appellants' assertion that injunctive relief is not appropriate under the circumstances of this case is meritless. NWA was charged with 91 separate and continuing violations of the regulations, 75 of which a hearings officer held violated these regulations. Civil penalties of over $45,000 were assessed. On the record before us, we agree with the Bureau that NWA's conduct was not an isolated event, but rather a pattern of misconduct affecting the minors that it employed. The remedy suggested by NWA, case-by-case enforcement of the regulations, would not only be a waste of judicial and administrative resources, but would not address the broad problem of

continued child labor violations. Injunctive relief was therefore proper.

Appellants also argue that the Marion court erred by granting summary judgment in favor of the state and by refusing to grant their own cross-motion for summary judgment. They argue that summary judgment is inappropriate in cases involving constitutional issues and that, in any event, there were material issues of fact. Summary judgment is proper when:

> "the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ORCP 47C.

In reviewing a summary judgment, the record is viewed in the light most favorable to the party opposing the motion. Seeborg v. General Motors Corporation, 284 Or 695, 699, 588 P2d 1100 (1978). The constitutionality of statutes or ordinances may properly be determined

on summary judgment. See Schaumburg v. Citizens for Better Environment, 444 US 620, 100 S Ct 826, 63 L Ed 2d 73 (1980).

We conclude that summary judgment was properly granted. The material facts in the Marion County action were not in dispute. Unlike the Multnomah County action, where the issue of appellants' conduct was central, the questions presented in the Marion County action were purely legal. Accordingly, once the court had determined that appellants' constitutional challenges were meritless, the state was entitled to judgment as a matter of law.[12]

Affirmed.

* * *

Petitioners sought review in the Oregon Supreme Court, but said petition was denied on August 29, 1989 as follows:

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[12] Appellants' remaining assignments of error are without merit.

IN THE SUPREME COURT OF
THE STATE OF OREGON

NORTHWEST ADVANCEMENT, INC., HENKE, JEFF COX, TIM GEER, JOE Petitioners	)	ORDER DENYING REVIEW
	)	CA A42520
	)	SC S36260
v.	)	
WAGE AND HOUR COMMISSION BUREAU OF LABOR & INDUSTRIES Respondents	)	

The court has considered the petition for review and ORDERS that it be denied.

DATE: AUGUST 29, 1989.

/s/ Edwin J. Peterson
EDWIN J.PETERSON
CHIEF JUSTICE

* * *

Petitioners then sought reconsideration of the Oregon Supreme Court's Order denying review, but said petition was denied on November 16, 1989, as follows:

IN THE SUPREME COURT OF
STATE OF OREGON

NORTHWEST ADVANCEMENT, INC., JEFF HENKE, JOE GEER, and TIM COX,	)	ORDER DENYING RECONSIDERATION
Petitioners on Review,	)	
v.	)	CA A42520 SC S36260
WAGE AND HOUR COMMISSION,	)	
Respondent on Review.	)	
NORTHWEST ADVANCEMENT, INC., JEFF HENKE, JOE GEER, and TIM COX,	)	
Petitioners on Review,	)	
v.	)	
BUREAU OF LABOR AND INDUSTRIES,	)	
Respondent on Review.	)	

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATE: November 16, 1989

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Finally, petitioner applied for an extension of time to file the petition for certiorari in this Court, and it was granted as follows:

SUPREME COURT OF THE UNITED STATES

No. A-608

Northwest Advancement, Inc., et al.,

Petitioners

v.

Wage and Hour Commision, Bureau of Labor and Industries of Oregon

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ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the

same is hereby extended to and including April 15, 1990.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 28th day of February.

April 15, 1990, is a Sunday. Pursuant to Rule 29.1, the petition for a writ of certiorari was due on Monday, April 16, 1990.